UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL GILL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 94-215-P-DMC***
	)	
SCOT THOMAS, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

The plaintiff in this case presses civil rights claims under federal and state law, as well as pendent state-law tort claims, in connection with his 1993 arrest by an officer of the South Berwick, Maine police department following a routine traffic stop. The defendants are the arresting officer, his police chief and the municipality itself. All three seek summary judgment on immunity grounds, also contending that the plaintiff may not assert claims for violation of his due process rights and for punitive damages. For the reasons discussed below, I grant the defendants' motion in part and deny it in part.

Pursuant to 42 U.S.C. § 1983, the plaintiff alleges the violation of his rights to due process and to be protected from illegal search and seizure as secured by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. He contends that the defendant municipality is subject to section 1983 liability because the deprivation of his constitutional rights occurred pursuant to

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

municipal custom or policy, and because the municipality was deliberately indifferent to the occurrence of such violations. He also seeks relief pursuant to the Maine Civil Rights Act, 5 M.R.S.A. § 4681 *et seq*., and the Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq*., as applicable to the common law governing assault, battery, intentional infliction of emotional distress and negligent infliction of emotional distress.[2] The complaint seeks both compensatory and punitive damages.

This court's jurisdiction is premised on both the federal questions presented and on diversity of citizenship. The plaintiff is a citizen of New Hampshire; the defendants are all of Maine.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, `material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant." *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 1995 U.S. App. LEXIS 13295 at *5 (1st Cir., May 31, 1995). "By like token, `genuine' means that `the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Id*.

[2] Although the complaint includes a specific count seeking to establish liability pursuant to the Tort Claims Act, as well as separate counts asserting the common-law tort claims described above, the Tort Claims Act by its terms does not create a cause of action but establishes certain limits on a plaintiff's ability to obtain relief for torts by government entities and their employees. Nevertheless, the Law Court has held that the Tort Claims Act, as a statutory formulation of the doctrine of sovereign immunity, "displaces any common law doctrine of liability." *Young v. Greater Portland Transit Dist*., 535 A.2d 417, 419 (Me. 1987). The plaintiff's common-law claims are therefore properly viewed as elaborations of his claim pursuant to the Tort Claims Act.

(citation omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2).

II. Factual Context

Viewed in the light most favorable to the plaintiff, the material evidence in the summary judgment record may be summarized as follows: Defendant Scot Thomas, an officer with the South Berwick Police Department, arrested the plaintiff in the early morning hours of November 27, 1993 in connection with a traffic stop. Affidavit of Scot Thomas ("Thomas Aff."), Exh. A to Defendants' Statement of Uncontroverted Facts (Docket No. 11), at ¶¶ 1, 2, 5. Thomas stopped the plaintiff because the license plate light and one of the tail lights of the vehicle being driven by the plaintiff were not working. *Id*. at ¶ 2. After taking the plaintiff's license and automobile registration, Thomas was informed by his dispatcher that the plaintiff's driving privileges had been suspended in Maine as a result of a failure to appear in state court on with a previous driving violation. *Id*. It was the policy of the South Berwick Police Department to arrest all persons whom the police believe are

operating a motor vehicle while under suspension for failure to appear in court. Affidavit of Dana Lajoie ("Lajoie Aff."), Exh. B to Defendants' Statement of Uncontroverted Facts, at ¶ 3. Accordingly, Thomas decided to arrest the plaintiff. Thomas Aff. at ¶ 3.

Thomas returned to the plaintiff's vehicle and asked him to step out of it and walk towards the police cruiser. Deposition of Michael Gill ("Gill Dep.") at 18, 19. At some point, either as he was getting out of his vehicle or standing in front of the police cruiser, the plaintiff asked Thomas what the problem was. *Id*. at 20-21. Thomas instructed the plaintiff to turn around and place his hands on the cruiser with his feet spread apart. *Id*. at 23. At this point, the plaintiff again asked Thomas what the problem was. *Id*. Thomas replied that the plaintiff's driving privileges were under suspension in Maine; he may also have indicated that the plaintiff was under suspension in New Hampshire. Deposition of Scot Thomas ("Thomas Dep.") at 63. In fact, the plaintiff was under suspension only in Maine. Gill Dep. at 24-25. The plaintiff indicated to Thomas that he thought Thomas was mistaken about his driving privileges and that he had a valid license. *Id*. at 25. Thomas then placed one of his hands down by his pocket and asked the plaintiff if he would have to use "this," something the plaintiff believed was a reference to a weapon. *Id*. at 25-26.

The plaintiff then complied with the officer's request that he turn around and place his hands on the cruiser. *Id*. at 27. Seconds later, a police dog that had been inside the cruiser emerged from the vehicle, and attacked the plaintiff by biting down on one of his arms and pulling the plaintiff toward the ground. *Id*. Thomas had neither summoned the dog nor seen him coming toward the plaintiff. Thomas Dep. at 72; Gill Dep. at 29. After a period of five to ten seconds, Thomas caused the dog let go of the plaintiff; Thomas then placed the plaintiff in handcuffs and began walking him toward one of the back doors of the cruiser. Gill Dep. at 29-30.

At this point, while in handcuffs, the plaintiff complained to Thomas that he had just been bitten by the officer's dog; the plaintiff stated that he would be filing a lawsuit against Thomas as a result. *Id*. at 30-31. This appeared to make Thomas angry. *Id*. at 31. Thomas then reached into his pocket, removed a canister and sprayed the plaintiff in the eyes with an irritating substance known as oleoresin capsicum. *Id*. at 32; Thomas Aff. at ¶¶ 1, 4. Temporarily blinded, the plaintiff sank to his knees and remained on the ground for between ten and fifteen seconds, when someone pushed him into the back seat of the cruiser. Gill Dep. at 33. There the plaintiff remained for at least ten minutes; during this period, Thomas heard what he believed to be the sound of a door of his vehicle opening and closing. *Id.* at 35. Thomas then returned to the cruiser to radio for assistance, and after another ten minutes Officer Mark Chamberlain, also of the South Berwick Police Department, arrived. *Id*. at 37. One of the officers drove the plaintiff to the garage of the South Berwick police station, where Thomas sprayed the plaintiff's eyes with water to relieve the irritation. *Id*. at 38-39; Thomas Aff. at ¶ 5. Officer Chamberlain then transported the plaintiff to the York County Jail in Alfred. Gill Dep. at 39-40. No supervisory personnel from the South Berwick Police Department were present for any of these events. Lajoie Aff. at ¶ 2.

At the time of the plaintiff's arrest, Thomas had been instructed in the proper use of oleoresin capsicum and was certified as a "K-9" officer as a result of training he completed with his police dog at the Maine Criminal Justice Academy. Thomas Aff. at ¶ 1. His employer, the Town of South Berwick, was a participant in the Property & Casualty Risk Pool of the Maine Municipal Association, which provided the town with limited liability insurance coverage. Affidavit of Richard B. Brown ("Brown Aff."), Exh. E to Defendants' Statement of Uncontroverted Facts, at ¶¶ 2, 3. Coverage pursuant to the Property & Casualty Risk Pool is expressly limited to liabilities that are

outside the immunities accorded to municipalities by the Maine Tort Claims Act. Brown Aff. at ¶ 4; Affidavit of Pamela Cheeseman, Exh. F to Defendants' Statement of Uncontroverted Facts, at ¶ 4.

Less than two years prior to the arrest of the plaintiff, on January 29, 1992, a private investigating firm known as Buchanan & Associates completed a three-volume report of its investigation into allegations of misconduct by the members of the South Berwick Police Department. Affidavit of James Kotredes ("Kotredes Aff."), Exh. A. to Plaintiff's Objection and Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Memorandum") (Docket No. 12), at ¶¶ 3, 4. At issue were 29 separate allegations of police misconduct. Id. at ¶ 5. Thomas was involved in 15 of the 29 allegations investigated.[3]

Buchanan & Associates presented its findings to a "Select Citizens Committee" appointed for this purpose by the town selectmen. *Id*. at ¶¶ 3, 4. As a result of the report, the Select Citizens Committee recommended, *inter alia*, that the town manager seek the resignation of defendant Lajoie as South Berwick's police chief. Report From the Select Citizen's Committee on Police Misconduct, Exh. B to Plaintiff's Memorandum, at ¶ 1. The committee concluded that it was "obvious that the supervisory control [in the South Berwick Police Department] was severely lacking." *Id*. The report also recommended that the town manager and police chief update the department's standard operating procedures and strictly enforce the updated procedures; the report called on the town council and town manager to "establish and provide for sensitivity and public relations training for all Police Officers." *Id*. at ¶¶ 3-4. Finally, the report recommended that the town manager "closely

[3] To support this statement I rely on the representation to that effect made by counsel for the plaintiff at pages five and six of the Plaintiff's Memorandum. Although a deviation from normal summary judgment practice, which requires factual assertions to be supported by record citations, this is appropriate in light of my previous order (Docket No. 8) compelling the Town of South Berwick to make the Buchanan Report available to the plaintiff but limiting the public disclosure of information contained therein.

monitor the performance of certain officers that are named consistently throughout many of the allegations of misconduct." *Id*. at ¶ 5.

The only disciplinary action taken as a result of the investigation was a two-week suspension of Lajoie; he remained chief through the time of the plaintiff's arrest. Kotredes Aff. at ¶ 8; Lajoie Aff. at ¶ 1. No disciplinary action was taken against Thomas in connection with the Buchanan & Associates report. Defendant Scot Thomas' Answers to Plaintiff's Interrogatories, Exh. F to Plaintiff's Memorandum, at ¶ 14.

III. The Maine Tort Claims Act

The defendants first contend that the Maine Tort Claims Act renders them immune from tort liability. I agree in part.

The Tort Claims Act provides that employees of governmental entities shall be "absolutely immune" from personal civil liability for, *inter alia*, "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused." 14 M.R.S.A. § 8111(1)(C). This absolute immunity applies "whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question." *Id*. at subsection (1). The defendants rely on the Law Court's interpretation of this language in *Leach v. Betters*, 599 A.2d 424 (Me. 1991), to contend that Thomas is entitled to absolute immunity. I find *Leach* to be inapposite. At issue there were allegations that police used excessive force in the process of arresting the plaintiff and placing her in handcuffs. *Id*. at 425. In the present case, viewing the facts in the light most favorable to the plaintiff, he was already in handcuffs at the time he was sprayed with oleoresin capsicum and there was no further resistance by the defendant. Thus, there was at least arguably no occasion for *any* use

of force. *Leach* explicitly left open the possibility that a police officer might be liable in tort when "ill will, bad faith, or improper motive" takes the case out of the realm of discretionary function and into the realm of conduct that is "wanton and oppressive." *Id*. at 426. This may be such a case. *See also Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1487 (D. Me. 1992) (Tort Claims Act "provides no shield from liability for a police officer's intentional harm to another"). I am therefore unwilling to find Thomas immune from tort liability at this stage of the proceeding.

However, the discretionary function provisions of the Tort Claims Act cloak Lajoie with immunity for liability that derives from his training and supervision of Thomas. *Hegarty v. Somerset County*, 848 F. Supp. 257, 270 (D. Me. 1994), *reversed in part on other grounds*, 53 F.3d 1367 (1st Cir. 1995). The defendants have demonstrated that this is the only possible basis for Lajoie's liability; he had no direct involvement in any of the events giving rise to the lawsuit. He is entitled to summary judgment in his favor on the tort claims.

The Tort Claims Act also provides that "all government entities shall be immune from suit on any and all tort claims seeking recovery of damages." 14 M.R.S.A. § 8103(1). None of the exceptions to municipal immunity enumerated in 14 M.R.S.A. § 8104-A apply. The municipality has demonstrated that it has not waived its immunity by obtaining liability insurance coverage as set forth in 14 M.R.S.A. § 8116. Accordingly, the municipality is entitled to summary judgment on all of the tort claims.

IV. The Civil Rights Claims

The defendants further contend that because Thomas had probable cause to arrest the plaintiff, he is immune from section 1983 liability in connection with his use of force. It is also their

position that Lajoie and the municipality are not subject to section 1983 liability because their supervisory activities withstand constitutional scrutiny. I find genuine issues of material of fact sufficient to preclude immunity for all three defendants.

Qualified immunity shields a government official from section 1983 liability for alleged deprivations of constitutional rights "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The standard is one of objective reasonableness. *Id*. at 641. This standard is "comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). But, accepting the plaintiff's version of what transpired on the early morning in question, there were no exigent circumstances. The plaintiff was handcuffed and fully under the control of Thomas, who sprayed the plaintiff with a blinding substance not as part of the arrest but in reaction to the plaintiff's threat of a lawsuit. No one could call such police behavior objectively reasonable. *Cf. Creamer v. Sceviour*, 652 A.2d 110, 112-13 (Me. 1995) (defendant, while in handcuffs, continued to interfere with police business at crime scene; spraying defendant in face with "Cap Stun II" objectively reasonable and police entitled to qualified immunity). Summary judgment in favor of Thomas is thus precluded, even at the risk that the factfinder will later choose not to credit the plaintiff's account and thus that Thomas may ultimately be immune from section 1983 liability. "[W]hen only a fact finder's determination of the conflicting evidence as to the underlying historical facts will permit resolution of the immunity issue[,] summary judgement ceases to be an appropriate vehicle." *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991); *cf. Lowinger v. Broderick*,

50 F.3d 61, 66 n.7 (1st Cir. 1995) (summary judgment appropriate where only dispute as to historical facts involved whether officer's perception of them at scene was accurate).

Nor do I find an absence of any trialworthy issues as to the two other defendants, the Town of South Berwick and Lajoie. As the plaintiff makes clear in his memorandum, his only basis for holding these defendants liable under section 1983 is that which is recognized in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978). "[L]ocal governments, like every other § 1983 `person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental `custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id*. at 690-91. Similarly, a supervisor may be liable under section 1983 when his training or supervision of another reflects a "reckless or callous indifference to the constitutional rights of others." *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 92 (1st Cir. 1994). However, neither a municipality nor a supervisor can be held liable on a *respondeat superior* theory. *Monell*, 436 U.S. at 691; *Febus-Rodriguez*, 14 F.3d at 91.

The evidence presented by the plaintiff, if accepted by the factfinder, takes the municipality and its police chief well beyond the realm of *respondeat superior*. As the result of the 1992 reports of Buchanan Associates and the Select Citizens Committee, both defendants were on notice that police misconduct, both generally and specifically that of defendant Thomas, was a significant problem. The reports also put the municipality on notice that Lajoie's supervision was inadequate. For purposes of the defendants' summary judgment motion, it would be inappropriate for the court to conclude that this inadequacy did not rise to reckless indifference to the constitutional rights of others, and that the specific misconduct alleged to have been committed by Thomas was not pursuant to the custom of the South Berwick Police Department.

In support of their position, the defendants cite *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, 121 L. Ed.2d 371 (1992). This is not persuasive. At issue in *Fraire* was a municipality's written policy on the use of deadly force; summary judgment in favor of the municipality was appropriate because the plaintiffs "pointed to no provision in [the] policy that could be construed to authorize an officer to use deadly force unnecessarily or unjustifiably." *Id*. at 1281. Here, by contrast, the focus is not on the constitutional adequacy of a written policy but on the alleged indifference to constitutional rights manifested by a municipality and its police chief in the course of supervising and training one of its police officers.

I agree with the defendants, however, that the plaintiff is precluded as a matter of law from pursuing the due process theory articulated in his complaint. All claims of excessive use of force by police officers are properly analyzed under the "reasonableness" standard of the Fourth Amendment rather than under a "substantive due process" approach. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Thus, the defendants are entitled to summary judgment on the separate counts that specifically seek to fix liability for violations of due process.

The Law Court applies the same qualified immunity analysis conducted pursuant to section 1983 when considering claims that arise under the analogous Maine Civil Rights Act. *Jenness v. Nickerson*, 637 A.2d 1152, 1155-56 (Me. 1994). Accordingly, and for the same reasons discussed in connection with section 1983, the defendants are not entitled to summary judgment on the Civil Rights Act claim alleging illegal search and seizure. *See Fowles v. Stearns*, 886 F. Supp. 894, 1995 U.S. Dist. LEXIS 7142 at *13, n.6 (D. Me., May 17, 1995) (noting that the Civil Rights Act is patterned after section 1983, and therefore that the same municipal liability analysis applies).

V. Punitive Damages

The defendants further contend that punitive damages are not available to the plaintiff under section 1983 and the Law Court's holding in *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).

As the defendants point out, a municipality is immune from punitive damages under section 1983 for the bad-faith actions of its officials. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Accordingly, the Town of South Berwick is entitled to summary judgment on the plaintiff's claim for punitive damages to the extent that it seeks to impose such damages pursuant to section 1983. Other defendants may be liable for punitive damages on a section 1983 claim in cases of "reckless or callous disregard for the plaintiff's rights" or "intentional violations of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983). A factfinder, choosing to credit the evidence produced by the plaintiff, could find that both Thomas and Lajoie engaged in conduct that meets the test articulated in *Smith*.

Tuttle establishes that punitive damages are available to a plaintiff as a matter of Maine law "where the defendant's tortious conduct is motivated by ill will toward the plaintiff" or where a defendant's deliberate conduct "is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Tuttle*, 494 A.2d at 1361. Such conduct must be proven by clear and convincing evidence. *Id*. at 1363. Although this is a high hurdle for the plaintiff on his tort claims, I am unwilling to conclude at this stage in the proceedings that the plaintiff will be unable to clear it.

VI. Conclusion

Accordingly, the defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART** as follows: Judgment shall enter in favor of all defendants on Counts I and V (due process claims under section 1983 and Maine Civil Rights Act); in favor of defendant Town of South Berwick on Counts VII, VIII, IX, X, XI (state-law tort claims) and XII (punitive damages); in favor of defendant Lajoie on Counts VII, VIII, IX, X and XI (state-law tort claims); otherwise, the defendants' motion is denied.

Dated at Portland, Maine this 1st day of August, 1995.

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David M. Cohen
United States Magistrate Judge